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# Upholding Precedent: How the U.S. Supreme Court Should Approach the Green Tree Circuit Split

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## UPHOLDING PRECEDENT: HOW THE U.S. SUPREME COURT SHOULD APPROACH THE *GREEN TREE* CIRCUIT SPLIT

Kristen Porter†

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### I. INTRODUCTION

Disputes have been settled by arbitration at least since the days of ancient Greece.<sup>1</sup> Phoenicians and desert traders in the time of Marco Polo used contractual arbitration, and Peisistratus of Athens in the Sixth Century B.C. sent arbitrators throughout the countryside to settle

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1. See Douglas Wigner, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499, 1502 (1995).

disputes.<sup>2</sup> However, it was common practice in the English courts for judges to display severe hostility to arbitration, sensing that arbitration threatened their judicial positions.<sup>3</sup> American judges initially shared this hostility, but as the industrial revolution swept across the nation, arbitration agreements became more prevalent and more readily accepted.<sup>4</sup>

Reflecting this change in attitude toward arbitration, Congress enacted the Federal Arbitration Act (FAA) (then called the United States Arbitration Act), to ensure the validity of these agreements as enforceable contract provisions.<sup>5</sup> As a result of amendments to the FAA, courts have encountered more litigation centered on contractual arbitration.

Last summer, the Third and Eleventh Circuits, within two weeks of each other, issued opinions involving arbitration agreements in Green Tree Financial Corporation contracts.<sup>6</sup> The agreements were strikingly similar, but the holdings were inapposite.<sup>7</sup> In *Randolph v. Green Tree*,<sup>8</sup> the Eleventh Circuit invalidated an arbitration agreement because the procedural process of arbitration was unascertainable.<sup>9</sup> In *Harris v. Green Tree*,<sup>10</sup> the Third Circuit enforced an arbitration agreement even though it gave Green Tree the option to litigate while requiring the Harrises to arbitrate their claims.<sup>11</sup>

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2. See ROBERT M. SMITH, ADR FOR FINANCIAL INSTITUTIONS § 5:01 (1998).

3. See *id.*; see also David P. Pierce, *The Federal Arbitration Act: Conflicting Interpretations of its Scope*, 61 U. CIN. L. REV. 623, 625 (1992). In the past, English judges received fees for each case they heard. See Alison B. Overby, *Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137, 1139 (1986). Arbitration diminished the number of cases the judges heard and fees they received for hearing those cases. See *id.* In England, agreements to arbitrate existing and future disputes were revocable until the presiding arbitrator rendered a decision. See *id.* In 1698, England created statutory arbitration but still allowed for revocation. See *id.* Only in 1889 did England codify the rule that parties could not revoke agreements to arbitrate both existent and future disputes. See *id.*

4. See Wigner, *supra* note 1, at 1502.

5. See *id.* at 1503.

6. See *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 184 (3d Cir. 1999) (compelling arbitration under the arbitration clause in the contract); *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149, 1159 (11th Cir. 1999), *cert. granted*, 120 S. Ct. (2000) (holding arbitration clause unenforceable).

7. The *Harris* court found that the arbitration clause comported with the requirements of the Federal Arbitration Act and was therefore enforceable. See *Harris*, 183 F.3d at 184. The *Randolph* court found that the arbitration clause at issue failed to make clear which party was responsible for arbitration fees and was therefore unenforceable. See *Randolph*, 178 F.3d at 1158.

8. 178 F.3d 1149 (11th Cir. 1999).

9. See *id.* at 1158.

10. 183 F.3d 173 (3d Cir. 1999).

11. See *id.*

Given the dissimilar analyses of the circuit courts, it is not surprising that the U.S. Supreme Court agreed to review *Randolph*. This case note first will examine the foundation of contractual arbitration and discuss its foundations in the FAA and U.S. Supreme Court decisions. Next, this note will consider the Eighth Circuit's standing on issues similar to those decided in *Randolph* and *Harris*. Part IV will recount the facts and courts' analyses in the *Randolph* and *Harris* decisions. Finally, this note will argue that the Court should continue its strong stance favoring contractual arbitration when the Court decides *Randolph* and if the court reviews *Harris*.

## II. FOUNDATION OF PRE-DISPUTE ARBITRATION AGREEMENTS

Arbitration, a dispute resolution process whereby a neutral third party renders a decision after two or more parties have stated their case, is the most-commonly used form of alternative dispute resolution.<sup>12</sup> Although some groups are reluctant to support this form, the facts demonstrate that contractual arbitration typically is the best way to resolve most consumer disputes.<sup>13</sup> Most opposition to contractual arbitration arises in the area of arbitration clauses placed in form contracts. However, statistics show that consumers actually fare better in arbitration than in court. For example, in federal court, corporations prevail eighty-seven percent of the time in suits against individuals.<sup>14</sup> By comparison, in arbitration proceedings administered by the National Arbitration Forum,<sup>15</sup> recent studies show that corporations prevail over individuals only sixty-three percent of the time.<sup>16</sup>

Further, most Americans prefer arbitration to litigation.<sup>17</sup> Arbitration

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12. See BLACK'S LAW DICTIONARY 105 (6th ed. 1991); SMITH, *supra* note 2, at § 5.01.

13. See *infra* notes 14-19.

14. See Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 603 (1998).

15. Headquartered in Minneapolis, Minn., the National Arbitration Forum is one of the world's largest neutral administrators of arbitration services and the national leader in e-commerce arbitration. Arbitrators on the Forum's select international panel are independent legal experts—former judges, senior attorneys and law professors.

16. Studies on file with author.

17. See *Roper Poll Reveals Americans' Preferences for Resolving Legal Issues; Majority Believe Arbitration is Their Best Option*, PR NEWswire, Nov. 15, 1999 (available on the National Arbitration Forum's web site (visited June 6, 2000) <<http://www.arb-forum.com/library.html>>).

is faster, cheaper and potentially less hostile than the courtroom.<sup>18</sup> These factors work together to provide all parties with access to justice, which likely has influenced the significant growth of contractual arbitration.

Contractual arbitration, sometimes referred to as "private" or "commercial arbitration,"<sup>19</sup> has been widely used by contracting parties for many years.<sup>20</sup> Court-appointed arbitration, on the other hand, just recently has experienced significant growth.<sup>21</sup> The arbitration process typically begins by one party to a transaction inserting a pre-dispute arbitration clause into the parties' contract. This clause stipulates that all future disputes will be settled by arbitration. Arbitration clauses usually contain the name of an arbitration administrator whose procedural rules are incorporated into the arbitration agreement by reference.<sup>22</sup> Arbitration administrators are used to prevent bias on behalf of the arbitrators, since neither party usually has any relationship with the administrator.

Arbitration administrators coordinate arbitration selection, collect fees, distribute payment to arbitrators, schedule hearings and handle most other administrative duties.<sup>23</sup> Three of the most prominent arbitration administrators are the National Arbitration Forum, the American Arbitration Association and J.A.M.S./Endispute.<sup>24</sup>

Many industries have used contractual arbitration extensively in the United States.<sup>25</sup> The financial industry, however, has used arbitration

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18. See Pierce, *supra* note 3, at 624-25.

19. See SMITH, *supra* note 2. Some groups, such as the Trial Lawyers for Public Justice (TLPJ) have referred to contractual arbitration as "mandatory arbitration." The TLPJ argue that even though both parties specifically agreed to the arbitration clause before the dispute arose such clause should not necessarily be enforced. See Trial Lawyers for Public Justice web site (visited Jan. 9, 2000) <<http://www.tlpj.org/tlpj/briefs.htm>>. The site provides links to briefs written for the Trial Lawyers for Public Justice's "Mandatory Arbitration Abuse Prevention Project." See *id.* The briefs oppose some arbitration clauses to which both parties had previously agreed. See *id.*

20. See *id.*

21. See *id.*

22. See *id.*

23. See *id.*

24. See Alan J. Kaplinksy & Mark J. Levin, *Consumer Financial Services Arbitration: Last Year's Trend Has Become This Year's Mainstay*, 54 BUS. LAW., May 1999, at 1405 (explaining that these three leading independent arbitration administrators recently adopted "due process protocols" to ensure the fairness of arbitration proceedings).

25. See SMITH, *supra* note 2, at § 5:01-2 (citing ROTH ET AL., THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE 2:1 (1993)). "These industries include maritime, securities, commodities, international trade, labor, construction, medical malpractice, and escrow." See *id.*

programs only since 1986.<sup>26</sup> At first, courts resisted arbitration contracts but attitudes have shifted since enactment of the FAA.<sup>27</sup>

### A. *The FAA*

In 1925, Congress enacted the FAA.<sup>28</sup> Since then, courts have upheld arbitration agreements in several forms and in several industries.<sup>29</sup> Section 2 of the FAA may be the most prominent and controversial section of the Act.<sup>30</sup> It states:

A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>31</sup>

The U.S. Supreme Court, specifically since the mid-1980s, has developed a broad interpretation of section 2.<sup>32</sup> If a transaction involves interstate commerce,<sup>33</sup> an arbitration agreement covering that transaction is enforceable as long as it meets the basic requirements of contract law.<sup>34</sup> Therefore, most decisions focus on questions of unconscionability,

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26. See SMITH, *supra* note 2, at § 5:01-03.

27. 9 U.S.C. §§ 1-16 (1994).

28. See *id.*; SMITH, *supra* note 2, at § 5.06.

29. See *id.*

30. See Wigner, *supra* note 1, at 1499-1500 (stating that section 2 of the FAA has created some confusion in the courts due to its expansiveness).

31. 9 U.S.C. § 2.

32. See *infra* Part II.B.

33. See 9 U.S.C. § 1. Section 1 states:

“[C]ommerce,” as herein defined, means commerce among the several states or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or foreign nation, or between the District of Columbia and any State Territory or foreign nation.

*Id.*

34. See *infra* Part II.B.

consideration or mutuality, offer and acceptance.<sup>35</sup> If an arbitration agreement meets these standards, courts will enforce it under the FAA.<sup>36</sup>

### B. U.S. Supreme Court Decisions

During the past twenty-five years, courts have exhibited a strong preference for enforcing arbitration agreements.<sup>37</sup> The U.S. Supreme Court was at the forefront of this trend and most federal and state courts followed its lead.<sup>38</sup> As the courts, specifically the U.S. Supreme Court, interpreted provisions of the FAA, the old English common law practice of resisting arbitration lost ground.<sup>39</sup> The change in attitude was neither subtle nor slow; it was rapid and controversial.<sup>40</sup> Because this shift occurred so quickly, many judges hesitated in adopting a pro-arbitration stance.<sup>41</sup> U.S. Supreme Court decisions in the past quarter century caused most other courts to see the benefits of arbitration and follow the Court's lead.<sup>42</sup>

Since the mid-1980s, when arbitration cases began gaining momentum, the Court has addressed contractual arbitration issues thirteen times.<sup>43</sup> Four of the decisions significantly shaped the present

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35. See *infra* Part II.B.

36. See *infra* Part II.B.

37. See Jose A. Cabranes, *Arbitration and the U.S. Courts: Balancing their Strengths*, 70 N.Y. St. B.J., May/Apr. 1998, at 22-23 (stating reasons why courts now favor arbitration agreements, including flexibility and control of the parties).

38. See *id.* See, e.g., *Ferro Corp. v. Garrison Indus., Inc.*, 142 F.3d 926, 937 (6th Cir. 1998) (following the logic in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995) and holding that a choice of law provision in an arbitration agreement only applies to the substantive law the arbitrator will apply and not to the validity of the arbitration agreement); *In re Piper Funds, Inc.*, 71 F.3d 298, 301 (8th Cir. 1995) (holding that statutory claims are arbitrable and relying on *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 233-34 (1987)); *Morrison v. Colorado Permanente Med. Group*, 983 F. Supp. 937, 943-44 (D. Colo. 1997) (holding that the FAA preempts state law, thus applying the U.S. Supreme Court's reasoning in *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 684 (1996)); *Baer v. Terminix Int'l Co.*, 975 F. Supp. 1272, 1278 (D. Kan. 1997) (upholding an arbitration agreement based on the Court's analysis in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995)).

39. See Cabranes, *supra* note 37.

40. See *id.*

41. See *id.*

42. See *id.* The "New York Convention of 1990," which encouraged the recognition and enforcement of international arbitration awards, also contributed to the change in common law regarding arbitration. See *id.*

43. See *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998) (rejecting a claim under the Americans with Disabilities Act based upon the failure to submit to arbitration as provided for in the collective bargaining agreement); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) (holding that the FAA

state of arbitration law and established the scope of the FAA.<sup>44</sup> Specifically, these four decisions shaped modern application of the FAA to pre-dispute arbitration agreements with consumers.<sup>45</sup>

### 1. *The Southland Decision*

In *Southland Corp. v. Keating*,<sup>46</sup> the U.S. Supreme Court addressed questions surrounding the FAA's interaction with state laws.<sup>47</sup> The Court's

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preempted state law which conditioned enforceability of arbitration clause on compliance with specific notice requirements); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (establishing that provisions of the FAA that make arbitration provisions in a contract involving commerce enforceable extends the FAA's scope to the fullest extent of Congress' commerce clause power); *Vimar Seguros Y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528 (1995) (rejecting as premature the argument that an arbitration clause may be unenforceable simply because foreign arbitrators may not apply proper law); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (holding that decision whether arbitrators or courts have primary power depends on parties agreement); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (holding that a contract between a securities brokerage firm and customers permitted an arbitration panel to award punitive damages to customers); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (holding that an age discrimination claim is subject to "compulsory arbitration" in accordance with the arbitration provision of a securities registration); *Volt Info. Sciences, Inc. v. Leland Stanford Junior Univ.*, 489 U.S. 468 (1989) (stating that the FAA did not preempt state law that permitted stay of arbitration if parties agreed to apply state rules of arbitration); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987) (holding that court of appeals was not free to deny enforcement of an arbitrators award on belief that award was against public policy); *Perry v. Thomas*, 482 U.S. 483 (1987) (holding that state law allowing wage collection actions to be brought, regardless of a private arbitration agreement is preempted under the Supremacy Clause, by the FAA); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (determining that both securities and RICO claims are arbitrable); *AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643 (1986) (holding that the court, not the arbitrator has the primary power to determine whether parties to a collective bargaining agreement intended to arbitrate specific grievances); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (stating that a provision of the California Franchise Investment Law that requires judicial consideration of certain actions, conflicts with the FAA and violates the Supremacy Clause).

44. See *Casarotto*, 517 U.S. at 688-89 (holding that the FAA pre-empts state law); *Allied-Bruce Terminix*, 513 U.S. at 273-82 (holding that under some circumstances the FAA extends to the limit of Congress' commerce power); *Shearson/American Express*, 482 U.S. at 226 (holding that statutory claims are arbitrable under the FAA); *Southland*, 465 U.S. at 10 (holding that the FAA section 2 pre-empts state laws on arbitration and declares that arbitration is a favored policy).

45. See cases cited *supra* note 43. The other nine cases mainly addressed the areas of employment disputes and other areas of contractual arbitration.

46. 465 U.S. 1 (1984).

47. See *id.* at 11.



holding had a significant impact on the FAA, which is used to analyze arbitration agreements between all kinds of parties.<sup>48</sup>

The dispute in *Southland* centered on an arbitration agreement contained in a franchise agreement.<sup>49</sup> The franchisees brought suit against the franchisor alleging violation of California statutory law and fraud, misrepresentation, breach of contract and breach of fiduciary duty.<sup>50</sup> The franchisor responded with the affirmative defense that the franchisees failed to arbitrate pursuant to the franchise agreement.<sup>51</sup> The franchisor moved to compel arbitration and the franchisees sought class certification.<sup>52</sup>

The California Superior Court granted the franchisor's motion but did not include claims under the California Franchise Investment Law.<sup>53</sup> The franchisor appealed to the California Court of Appeals, arguing that the lower court erred in not including the claims under the California law in its holding.<sup>54</sup> The franchisees argued that the Superior Court should have ordered that arbitration proceed as a class action.<sup>55</sup> The Court of Appeals overturned the Superior Court's decision and ordered that the parties arbitrate all claims, including those under California law.<sup>56</sup> The court held that, under the Supremacy Clause,<sup>57</sup> section 2 of the FAA preempted state laws that render arbitration agreements unenforceable.<sup>58</sup>

The California Supreme Court reversed the Court of Appeals' decision and held that the claims under California law were not subject to arbitration.<sup>59</sup> It concluded that state law was not inconsistent with the FAA

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48. *See id.* at 16 (holding that state laws violate the Supremacy Clause of the U.S. Constitution if they are inconsistent with the FAA).

49. *See id.* at 4.

50. *See id.* The franchisees alleged that the franchisor violated the California Franchise Investment Law. *See id.* (citing CAL. CORP. CODE § 31000-31516 (West 1997)).

51. *See id.*

52. *See id.* The class contained approximately 800 franchisees from California and the claims were nearly identical to the original action. *See id.* The court consolidated all of the actions. *See id.*

53. *See id.*

54. *See id.*

55. *See id.* at 4-5. Class actions are typically inconsistent with the procedural and financial benefits of arbitration.

56. *See id.* at 5.

57. U.S. CONST. art VI, § 2.

58. *See id.*

59. *See id.* "The California Supreme Court interpreted the Franchise Investment law to require judicial consideration of claims brought under that statute and concluded that the California statute did not contravene the Federal Act." *Id.* at 6.

and remanded the case to the trial court.<sup>60</sup> The franchisor then appealed to the U.S. Supreme Court.<sup>61</sup>

The Court first looked to the interpretation of the state law at issue.<sup>62</sup> The California Supreme Court interpreted the statute to require “judicial consideration” of all claims brought under it.<sup>63</sup> The Court agreed with this interpretation and found that it was inconsistent with section 2 of the FAA.<sup>64</sup> It therefore directly conflicted with the FAA in violation of the Supremacy Clause.<sup>65</sup>

“In enacting [s]ection 2 of the Federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”<sup>66</sup> The Court stated that the FAA places only two limitations on the enforcement of FAA-governed arbitration agreements.<sup>67</sup> First, the agreements must be part of a contract involving interstate commerce and, second, the agreements must be revocable subject to the contract-law standards.<sup>68</sup>

The Court reaffirmed its view that the FAA governs enforceability of arbitration agreements in state and federal courts.<sup>69</sup> The Court analyzed congressional intent in enacting the FAA and found “strong indications” that Congress intended both federal and state courts to uphold arbitration clauses when they meet FAA requirements.<sup>70</sup> Using this foundation, the Court held that state statutes that are inconsistent with the FAA, such as the California statute at issue, violate the Supremacy Clause of the U.S. Constitution.<sup>71</sup>

## 2. *The Shearson/American Express Decision*

While *Southland* enunciated the rule that the FAA preempts inconsistent state law, *Shearson/American Express, Inc. v. McMahon*<sup>72</sup>

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60. *See id.*

61. *See id.*

62. *See id.* at 10.

63. *See id.*

64. *See id.*

65. *See id.*

66. *Id.*

67. *See id.* at 10-11.

68. *See id.* at 11. The contracts must be either maritime contracts or contracts “evidencing” interstate commerce. *See id.*

69. *See id.* at 12-13 (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983)).

70. *See id.* at 12.

71. *See id.* at 16.

72. 482 U.S. 220 (1987).

examined the FAA's co-existence with federal statutes.<sup>73</sup> In *Shearson/American Express*, the issue involved a dispute between a securities brokerage firm and its customers.<sup>74</sup>

The customers alleged that their broker engaged in "excessive trading" and gave them false and incomplete information on their accounts.<sup>75</sup> The customers also made a claim under the Federal Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>76</sup> The brokers sought to compel arbitration pursuant to an agreement between the parties and the district court granted the motion in part.<sup>77</sup> The district court held that all of the customers' claims, except the RICO claim, were subject to arbitration under the arbitration agreement.<sup>78</sup>

The Second Circuit Court of Appeals affirmed the lower court's decision that the RICO claim was not subject to arbitration.<sup>79</sup> The appellate court held that RICO plaintiffs were similar to "private attorney-general[s]" and that it would be against public policy to allow RICO claims to be resolved through arbitration.<sup>80</sup>

The U.S. Supreme Court, in applying section 2 of the FAA, overturned the Second Circuit's decision.<sup>81</sup> The Court noted the strong public policy in favor of arbitration.<sup>82</sup> The FAA, it explained, imposes a duty on the courts to "rigorously enforce agreements to arbitrate."<sup>83</sup> The Court then extended this duty to federal statutory claims.<sup>84</sup> It stated that the burden is on the party opposing arbitration of statutory claims to show

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73. See *id.* at 222.

74. See *id.* at 222.

75. See *id.* at 223. These claims, if proven, were violations of Section 10b of the Securities Exchange Act of 1934. See *id.* at 222 (citing 15 U.S.C. § 78j(b) (1994)).

76. See 18 U.S.C. 1962 (1994).

77. See *Shearson/American Express*, 482 U.S. at 223.

78. See *id.* at 223-24. The district court rejected the customers' claim that the arbitration agreements were unenforceable because they were adhesion contracts. See *id.*; see also *infra* note 80 and accompanying text (explaining why RICO claims are not arbitrable).

79. See *Shearson/American Express*, 482 U.S. at 224. The court of appeals found that the claims under the Securities Exchange Act of 1934 were not subject to arbitration. See *id.*

80. See *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94, 98 (2d Cir. 1986), *rev'd*, 482 U.S. 220 (1987).

81. See *Shearson/American Express*, 482 U.S. at 226, 242.

82. See *id.* at 225-26.

83. *Id.* at 226 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

84. See *id.* ("This duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights.").

that Congress intended to allow only judicial relief of those claims.<sup>85</sup>

### 3. *The Allied-Bruce Terminix Decision*

*Allied-Bruce Terminix Co., Inc. v. Dobson*<sup>86</sup> serves as a milestone for consumer arbitration law. The parties in this case consisted of consumers and a company.<sup>87</sup> The contract in dispute contained a pre-dispute arbitration clause.<sup>88</sup>

Before selling their home, Mr. and Mrs. Gwin hired Allied-Bruce Terminix (Terminix) to re-inspect their home for termites.<sup>89</sup> Terminix employees conveyed to the Gwins that the house was termite-free.<sup>90</sup> However, the house was infested with termites when the new owners moved in.<sup>91</sup> Litigation ensued in Alabama state court, and Terminix sought to stay the action pending arbitration pursuant to a contract between Terminix and the Gwins.<sup>92</sup> The district court denied the stay and the Alabama Supreme Court affirmed.<sup>93</sup>

The Alabama Supreme Court's analysis was based on the FAA requirement that the contract involved interstate commerce and used a test based on the parties' intentions to determine whether the contract did or did not involve interstate commerce.<sup>94</sup> The test used by the court was whether "at the time [the parties entered into the contract] and accepted the arbitration clause, they *contemplated* substantial interstate activity."<sup>95</sup> If they did not, section two of the FAA would not apply.<sup>96</sup> The Alabama Supreme Court held that the parties contemplated that the transaction would involve only local commerce and upheld the lower court's denial of the stay.<sup>97</sup>

The U.S. Supreme Court granted certiorari to resolve the conflict as

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85. *See id.* at 227.

86. 513 U.S. 265 (1995).

87. *See id.* at 268-69.

88. *See id.*

89. *See id.* at 268.

90. *See id.*

91. *See id.*

92. *See id.* at 269. The homebuyers sued the Gwins, who then cross-claimed against Terminix. *See id.*

93. *See id.*

94. *See id.* at 268-69 (applying section 2 of the FAA). The Court also noted that the Alabama Supreme Court found the FAA "inapplicable because the connection between the termite contract and interstate commerce was too slight." *Id.* at 269.

95. *Id.* at 269 (emphasis added).

96. *See id.*

97. *See id.*

to whether the Alabama Supreme Court's analysis, which other state and some federal district courts embrace, is correct, or whether, as most federal appellate courts have held, section 2 of the FAA reaches "to the limits of Congress' Commerce Clause power."<sup>98</sup>

The Court explained that courts should read section 2 of the FAA broadly.<sup>99</sup> It found that the Act's language "involving commerce" is the equivalent of "affecting commerce," which often is used to show Congress' intent to expand the statutes' reach to the limits of the Commerce Clause.<sup>100</sup> The Court looked to the linguistic structure of the statute, legislative history, prior decisions and the FAA's basic purpose and policy.<sup>101</sup> It stated that a narrow reading of the language "involving commerce" would be inconsistent with the FAA's purpose.<sup>102</sup> It would create a new and "unfamiliar test" and more litigation.<sup>103</sup> The main purpose of the FAA is to avoid litigation.<sup>104</sup>

Next, the Court analyzed the section 2 language "evidencing a transaction."<sup>105</sup> The Court held that courts must interpret this language by using a "commerce in fact" analysis instead of a "contemplation of the parties" analysis.<sup>106</sup> Using a "contemplation of the parties" analysis would invite litigation and allow parties to later assert that they did not contemplate that their transaction would involve interstate commerce, thus making their arbitration agreements unenforceable.<sup>107</sup> This analysis would be inconsistent with the FAA.<sup>108</sup> Also, the legislative history and Congress' intent weighed heavily in using a "commerce in fact" analysis.<sup>109</sup>

The Court extended its analysis to include a discussion on public policy,<sup>110</sup> discussing Congress' intent in enacting the FAA and examining

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98. *Id.* at 270. See, e.g., *Foster v. Turley*, 808 F.2d 38, 40 (10th Cir. 1986); *Snyder v. Smith*, 736 F.2d 409, 417-18 (7th Cir. 1984); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.* 271 F.2d 402, 406-07 (2d Cir. 1959).

99. See *Allied-Bruce Terminix*, 513 U.S. at 273-74.

100. See *id.* (citing *Russell v. United States*, 471 U.S. 858, 859 (1985)).

101. See *id.* at 273-77. The court could not look to other statutes with the same language, because the FAA was the only statute with the words "involving commerce." See *id.* at 273.

102. See *id.* at 275.

103. See *id.*

104. See *id.*

105. See *id.* at 277. The Court posed the question, "Does 'evidencing a transaction' mean only that the transaction (that the contract 'evidences') must turn out, in fact, to have involved interstate commerce? Or does it mean more?" *Id.*

106. See *id.* at 278.

107. See *id.* at 278-79.

108. See *id.* at 278.

109. See *id.* at 278-79.

110. See *id.* at 280-81.

which parties it benefited.<sup>111</sup> The Court concluded that Congress intended the Act to benefit both consumers and businesses of any size.<sup>112</sup> Congress enacted the FAA to relieve the time and expense of litigation.<sup>113</sup> The Court listed benefits of arbitration, which have become common appearances in court opinions nationwide.<sup>114</sup> The list included the fact that arbitration usually is faster and less expensive than litigation, has simpler rules of procedure and evidence, is less disruptive to present and future business dealings between the parties and has more flexible scheduling options.<sup>115</sup>

Therefore, the Court reversed the Alabama Supreme Court's decision to deny Allied-Bruce Terminix's motion to compel arbitration and held that courts must interpret the FAA using a broad, far-reaching analysis.<sup>116</sup> The Court applied the objective "commerce in fact" standard instead of the subjective "contemplation of the parties" test when deciding if a contract evidences "a transaction involving commerce."<sup>117</sup>

#### 4. *The Casarotto Decision*

In *Doctor's Associates, Inc. v. Casarotto*,<sup>118</sup> the Court examined a Montana statute that placed notice restrictions on arbitration agreements.<sup>119</sup> In *Casarotto*, a franchisee brought suit against a franchisor alleging state law and tort claims.<sup>120</sup> The franchisor moved to stay the proceedings pending arbitration pursuant to an arbitration clause in the franchise agreement.<sup>121</sup> The trial court granted the motion but the Montana Supreme Court reversed on appeal.<sup>122</sup>

The Montana Supreme Court held that the trial court was correct in finding that the agreement fell within the confines of the FAA, but it also held that a Montana statute rendered the arbitration clause

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111. See *id.* at 280.

112. See *id.*

113. See *id.*

114. See *id.* See, e.g., *National Broad. Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 191 (2d Cir. 1999); *Dorsey v. H.C.P. Sales, Inc.*, 46 F. Supp.2d 804, 807-08 (N.D. Ill. 1999) (holding congressional intent was to provide a "less expensive alternative to litigation" through arbitration).

115. See *Allied-Bruce Terminix*, 513 U.S. at 273-74, 282.

116. See *id.*

117. See *id.* at 278; see also 9 U.S.C. § 2 (1994).

118. 517 U.S. 681 (1996).

119. See *id.* at 683.

120. See *id.*

121. See *id.*

122. See *id.* at 683-84.

unenforceable.<sup>123</sup> That statute provided, "Notice that [the] contract is subject to arbitration . . . shall be typed in underlined capital letters on the first page of the contract."<sup>124</sup> The franchise agreement contained an arbitration agreement, but it appeared neither on the first page nor was typed in underlined capital letters.<sup>125</sup>

The U.S. Supreme Court granted certiorari and began its analysis with section 2 of the FAA.<sup>126</sup> It re-iterated that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions."<sup>127</sup> Section 2 prevents any state law from invalidating an arbitration agreement based solely on the fact that it is an arbitration agreement.<sup>128</sup> Arbitration agreements must meet the same standards as other contracts but do not need to meet higher state-statute imposed standards.<sup>129</sup>

The Court, therefore, reversed the Montana Supreme Court's decision and invalidated the state statute insofar as its applicability to arbitration agreements that fell within the FAA.<sup>130</sup> It relied heavily upon its decision and policy arguments in *Allied-Bruce Terminix*.<sup>131</sup>

Courts throughout the country have adopted the Court's position on the FAA and pre-dispute arbitration clauses in commercial agreements.<sup>132</sup>

123. *See id.* at 684.

124. *Id.* at 684 (quoting MONT. CODE ANN. § 27-5-114(4) (1995)).

125. *See id.* at 684.

126. *See id.* at 686.

127. *Id.* at 687.

128. *See id.*

129. *See id.*

130. *See id.* at 688-89.

131. *See id.* at 687-88; *supra* Part II.B.3 (outlining the Court's policy analysis in *Allied-Bruce Terminix*).

132. Nearly all courts have upheld these agreements, with one notable exception. *See Badie v. Bank of America*, 79 Cal. Rptr.2d 273, 291 (Cal. App. 1998). In *Badie*, a bank sent an amendment to its credit card terms in the mail to consumers holding credit cards. *See id.* at 276-77. The amendment included a pre-dispute arbitration clause. *See id.* at 277. The court invalidated the clause, stating that when a bank "attempts to 'recapture' a forgone opportunity by adding an entirely new term which has no bearing on any subject, issue, right or obligation addressed in the original contract and which is not within the reasonable contemplation of the parties when the contract was entered into" the contract amendment or change in terms is unenforceable. *Id.* at 284.

Note that the decision in *Badie* clearly contradicts section 2 of the FAA. *See* 9 U.S.C. § 2 (1994). According to section 2, arbitration clauses cannot be treated differently than other contracts. *See id.* ("A contract . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.") The Court in *Badie* analyzed the arbitration clause as though it was different from other contract terms. *See Badie*, 79 Cal. Rptr.2d at 284. If the amendment had been a change to the financial terms of the

The Eighth Circuit is no exception, with decisions spanning from the “*Allied-Bruce Terminix* era” through 1999.<sup>133</sup>

### C. Eighth Circuit Decisions

The Eighth Circuit Court of Appeals first visited contractual arbitration in 1953, when it held that arbitration agreements do not eliminate a court’s jurisdiction but rather allow the parties to stay any court proceeding while they pursue arbitration.<sup>134</sup> The court later examined several cases where arbitration agreements appeared in securities contracts.<sup>135</sup>

The Eighth Circuit continually has followed FAA policies in support of its enforcement of pre-dispute arbitration agreements<sup>136</sup> and recently restated its position in a case with facts similar to those in *Randolph*.<sup>137</sup>

The court in *Dobbins v. Hawk’s Enterprises*<sup>138</sup> stated that it “must consider the arbitrability of the issues with a healthy regard for the federal

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agreement, the court may have upheld it as within the contemplation of the parties and meeting the duty of good faith and fair dealing. *See id.*

133. The two most notable Eighth Circuit arbitration decisions are *Dobbins v. Hawk’s Enter.*, 198 F.3d 715 (8th Cir. 1999) (holding that plaintiffs seeking judicial review of an arbitration clause on grounds of an unconscionable arbitration fee must first have applied for an applicable fee waiver, if one is so available) and *Gammara v. Thorp Consumer Discount Co.*, 15 F.3d 93 (8th Cir. 1994) (holding that the FAA prohibits appeals from interlocutory orders to proceed with arbitration).

134. *See United Elec., Radio & Mach. Workers v. Oliver Corp.*, 205 F.2d 376, 385 (8th Cir. 1953).

135. *See Ackerberg v. Johnson*, 892 F.2d 1328, 1334 (8th Cir. 1989) (noting that Minnesota law does not preclude arbitration claims arising under the 1933 Securities Act); *Gans v. Merrill Lynch Futures, Inc.*, 814 F.2d 493, 497 (8th Cir. 1987) (holding that the Commodities Exchange Act did not prevent the arbitration of claims arising under the Act where provided for by contract); *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393, 1399 (8th Cir. 1986) (holding that pre-dispute arbitration agreements are enforceable under the 1934 Securities Exchange Act); *Arkoosh v. Dean Witter & Co.*, 571 F.2d 437, 438 (8th Cir. 1978) (holding that arbitration did not violate the terms of regulations set forth by the Commodity Futures Trading Commission).

136. *See Gammara*, 15 F.3d at 95. The court refused to hear the appellant’s case because it lacked jurisdiction. *See id.* The court lacked jurisdiction, because the proceeding was “embedded” and section 16 of the FAA prohibited the court to hear substantive issues until after the proceeding, when the parties sought to confirm or vacate the arbitration award. *See id.*; *see also* *Pierce*, *supra* note 3, (outlining public policy favoring arbitration).

137. *See Dobbins*, 198 F.3d at 715. Like *Randolph*, *Dobbins* sought judicial relief under the Truth in Lending Act, and in both cases the defendants sought enforcement of arbitration under sales contracts for mobile homes. *See infra* Part III.A (outlining the facts in *Randolph*).

138. 198 F.3d 715 (8th Cir. 1999).



policy in favor of arbitration and any doubts about the ability to arbitrate the issue should be resolved in favor of arbitration."<sup>139</sup> It also noted that unusually high filing fees could render an arbitration agreement unconscionable.<sup>140</sup> The court used a state-law standard of unconscionability to determine if the American Arbitration Association's filing fees were oppressive to one party, thus rendering the agreement substantively unconscionable.<sup>141</sup>

The court began its analysis by examining the complaining party's claim.<sup>142</sup> The party, a consumer, asserted \$50 million in punitive and compensatory damages stemming from violations under the Truth In Lending Act (TILA).<sup>143</sup> This claim resulted in a \$23,000 filing fee with the American Arbitration Association.<sup>144</sup> The court found that the claim was unrealistic, but this finding was not the foundation of its analysis.<sup>145</sup> It also found that the consumers did not ask for a filing fee waiver, an option under the rules of the American Arbitration Association.<sup>146</sup> Also, the opposing party offered at oral argument to pay the consumers arbitration fees, thus allowing another option for payment of the fees.<sup>147</sup>

The Eighth Circuit remanded the issue to the district court with instructions to order the consumers to present a reduced demand for damages and to seek a waiver or reduction of fees in accordance with the American Arbitration Association's rules.<sup>148</sup> It also directed the district court to accept the opposing party's offer to pay the fees if it determined that the fees still were too high given the consumer's financial situation.<sup>149</sup>

This decision is consistent with the trend in other circuits and the FAA, upholding pre-dispute arbitration agreements.<sup>150</sup> It also follows the

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139. *Id.* at 717 (citing *Keymer v. Management Recruiters, Int'l, Inc.*, 169 F.3d 501, 504 (8th Cir. 1999)).

140. *See id.*

141. *See id.* The party with whom the Court was concerned was a couple who purchased a mobile home from Carriage Homes. *See id.* at 716. Courts use a case-by-case analysis when determining unconscionability. *See id.* at 717.

142. *See id.* at 716.

143. *See id.* at 716 n.2.

144. *See id.* at 717.

145. *See id.* at 717 n.3.

146. *See id.* at 717.

147. *See id.* at 717 n.4.

148. *See id.* at 717.

149. *See id.*

150. *See Chelsea Square Textiles, Inc. v. Bombay Dyeing & Mfg. Co.*, 189 F.3d 289, 297 (2d Cir. 1999) (compelling arbitration of claims arising from a contract containing a pre-dispute arbitration clause); *Fedmet Corp. v. M/V Buyalyk*, 194 F.3d 674, 679 (5th Cir. 1999) (sending all claims to arbitration pursuant to a pre-dispute arbitration agreement in a bill of lading); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999) (upholding a pre-dispute arbitration agreement); P

U.S. Supreme Court's lead of interpreting the FAA and upholding pre-dispute arbitration agreements that meet the requirements of established contract law.<sup>151</sup>

The circuit split that occurred last summer serves as a backdrop to examine the FAA and court interpretation of it. While one case clearly is consistent with the precedent set by the U.S. Supreme Court and other federal courts, the other is a direct contradiction.

### III. RANDOLPH AND HARRIS

#### A. *The Randolph Decision*

Larketta Randolph initiated the lawsuit *Randolph v. Green Tree Financial Corp.*<sup>152</sup> in 1996.<sup>153</sup> Randolph purchased a mobile home and financed it through Green Tree in 1994.<sup>154</sup> In her complaint, Randolph alleged that Green Tree 1) violated certain provisions of the TILA when it required her to obtain "vendor's single interest insurance" but did not include the requirement in the TILA disclosure,<sup>155</sup> and 2) violated the Equal Credit Opportunity Act by including an arbitration agreement in

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& P Indus., Inc. v. Sutter Corp., 179 F.3d 861, 871 (10th Cir. 1999) (upholding a pre-dispute arbitration agreement); First Liberty Inv. Group v. Nicholsberg, 145 F.3d 647, 653 (3d Cir. 1998) (applying policy considerations to uphold an arbitration clause in an employment contract); Porter Hayden Co. v. Century Indem. Co., 136 F.3d 380, 384 (4th Cir. 1998) (upholding a pre-dispute arbitration clause in an insurance contract); Ferro Corp. v. Garrison Indus., Inc., 142 F.3d 926, 935 (6th Cir. 1998) (applying section two of the FAA to enforce a pre-dispute arbitration clause); Miller v. Flume, 139 F.3d 1130, 1136 (7th Cir. 1998) (upholding a pre-dispute arbitration agreement in a National Association of Securities Dealers contract); Scott v. Prudential Securities, Inc., 141 F.3d 1007, 1014 (11th Cir. 1998) (requiring a member of an organization to arbitrate all disputes pursuant to a pre-dispute arbitration clause contained in the organization's member rules); Commercial Union Ins. Co. v. Gilbane Bldg. Co., 992 F.2d 386, 391 (1st Cir. 1993) (upholding a pre-dispute arbitration agreement in a construction contract); Pearce v. E.F. Hutton Group, Inc., 828 F.2d 826, 833 (D.C. Cir. 1987) (upholding a pre-dispute arbitration agreement in a defamation case).

151. See *supra* Part II.B (outlining prominent U.S. Supreme Court cases concerning arbitration).

152. 178 F.3d 1149 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1552 (2000).

153. See *id.* at 1151-52.

154. See *id.* at 1151. Randolph purchased the mobile home from Better Cents Home Builders, Inc. in Alabama. See *id.* Better Cents Home Builders named Green Tree of Alabama, a wholly-owned subsidiary of Green Tree Financial Corporation, as assignee in their retail installment contracts. See *id.*

155. See *id.* at 1151-52. A vendor's single interest insurance "protects a vendor or lien holder against the costs of repossession in the event of default." *Id.* at 1151.

her contract requiring that the parties arbitrate all claims.<sup>156</sup>

In response, Green Tree moved to compel arbitration of Randolph's claims pursuant to the arbitration agreement in the retail installment contract that she signed.<sup>157</sup> The district court granted Green Tree's motion and held that all of Randolph's claims must go to arbitration.<sup>158</sup> Randolph appealed and Green Tree moved to dismiss the appeal, arguing that the Eleventh Circuit lacked jurisdiction.<sup>159</sup>

The appellate court used FAA section 16(a)(3) to determine whether it had jurisdiction.<sup>160</sup> The threshold question under section 16(a)(3) is whether the district court's decision was "final."<sup>161</sup> The court held that the decision was final in accordance with its general test that it "disposed of all the issues framed by the litigation, leaving nothing to be done but execute the order."<sup>162</sup> The court, therefore, established that it did have jurisdiction under section 16(a)(3).<sup>163</sup>

After determining jurisdiction, the Eleventh Circuit examined the enforceability of the arbitration clause in the retail installment contract.<sup>164</sup> Specifically, it considered whether TILA prevented the clause's enforcement.<sup>165</sup> The court used a three-step analysis. First, it recognized the strong federal policy in favor of arbitration.<sup>166</sup> It noted that some procedural "inherent weaknesses" should not, on their own, render an arbitration clause unenforceable.<sup>167</sup> Essentially, the court stated that if an

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156. See *id.* at 1151-52. Randolph also sought class certification of a class containing members who had entered into similar agreements with Green Tree. See *id.* at 1152.

157. See *id.*

158. See *Randolph v. Green Tree Fin. Corp.*, 991 F. Supp. 1410, 1424-25 (M.D. Ala. 1997), *rev'd*, 178 F.3d 1149 (11th Cir. 1999), *cert. granted*, 120 S. Ct. 1552 (2000).

159. See *Randolph*, 178 F.3d at 1152.

160. See *id.* at 1153. The Court noted that Congress' intent in enacting the FAA was to create "special rules governing appeals from a district court's arbitration order." *Id.* (quoting *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1243 (9th Cir. 1997)). The FAA specifically provides courts with guidelines for establishing jurisdiction.

161. See 9 U.S.C. § 16(a)(3) (1994).

162. *Randolph*, 178 F.3d at 1154 (quoting 15B CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 3914.17 (2d ed. 1992)).

163. See *Randolph*, 178 F.3d at 1156 (dismissing the action with prejudice, stating that the lower court's opinion was final because all of Randolph's claims were to be arbitrated).

164. See *id.* at 1157.

165. See *id.* The Court limited its analysis to the TILA issue, without considering Randolph's initial allegation that Green Tree also violated the Equal Credit Opportunity Act. See *id.* at 1157-58.

166. See *id.* at 1157.

167. See *id.* (quoting *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054,

arbitration party with a statutory claim can vindicate his or her cause of action under the statute, arbitration is an appropriate forum to bring his or her dispute.<sup>168</sup>

Second, the Eleventh Circuit examined a caveat to their first analytical step.<sup>169</sup> It stated that some procedural weaknesses in arbitration could create sufficient barriers to vindicating statutory claims, rendering an arbitration clause unenforceable.<sup>170</sup> If an arbitration clause governs an arbitration process that is procedurally unsound, and defeats the “remedial purpose of [a] statute,” the clause will be unenforceable.<sup>171</sup>

Finally, the Eleventh Circuit looked specifically to the arbitration agreement between Randolph and Green Tree and applied the above standards.<sup>172</sup> The arbitration clause, among other things, failed to name an established arbitration administrator or arbitrator.<sup>173</sup> The court’s main concern focused on the absence of essential information in the arbitration clause, typically ascertainable by naming an arbitration administrator.<sup>174</sup>

The clause did not specify the amount or process of paying filing fees, did not have an option for indigent parties to waive fees or establish any methods to determine who would be responsible for costs.<sup>175</sup> The court specifically was concerned with the plight of consumers.<sup>176</sup> The court was concerned that even if Randolph, a consumer, prevailed in arbitration, she still would be responsible for fees and costs.<sup>177</sup>

The court also found that the clause failed to specify any procedural rules.<sup>178</sup> The clause stated, “All disputes, claims, or controversies arising from or relating to this Contract or the relationships which result from

1062 (11th Cir. 1998)).

168. *See id.* (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)).

169. *See id.*

170. *See id.*

171. *See id.* (citing *Paladino*, 134 F.3d at 1062).

172. *See id.* at 1158.

173. *See id.*; *supra* Part II (explaining the arbitration process). Several organizations serve as neutral third-party arbitration administrators with established procedural rules and fees. *See* Kaplinsky & Levin, *supra* note 24.

174. *See Randolph*, 178 F.3d at 1158. When a contract names an arbitration administrator, the contract incorporates the administrator’s rules by reference. *See* SMITH, *supra* note 2.

175. *See id.* The National Arbitration Forum and American Arbitration Association both have provisions in their rules whereby individuals suffering from financial hardship can apply to the organizations for fee waivers. *See* Dobbins v. Hawks Enter., 198 F.3d 715, 717 (8th Cir. 1999); National Arbitration Forum, *Code of Procedure* (Sept. 1, 1999) (visited Jan. 1, 2000) <<http://www.arb-forum.com>>.

176. *See Randolph*, 178 F.3d at 1158.

177. *See id.*

178. *See id.*

this Contract, or the validity of this arbitration clause or the entire Contract, shall be resolved by binding arbitration by one arbitrator selected by Assignee with consent of Buyer(s)."<sup>179</sup> The court found that the clause, to be enforceable, must specify that parties would follow an arbitration administrator's rules or negotiate their own procedural rules.<sup>180</sup>

Although Green Tree argued that it typically used an arbitration provider, the court found that the clause was unenforceable.<sup>181</sup> The court held that the clause failed to "provide the minimum guarantees required to ensure that Randolph's ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrators' fees, or other high costs of arbitration."<sup>182</sup>

In sum, because the arbitration fees, costs and procedural guidelines were unascertainable in the arbitration clause, the court determined that Randolph might have been unable to vindicate her statutory claims under TILA.<sup>183</sup> Therefore, the court held that the arbitration clause was unconscionable and remanded the case to the district court.<sup>184</sup>

### B. *The Harris Decision*

In *Harris v. Green Tree Financial Corp.*,<sup>185</sup> Charles and Christine Harris (the Harrises) brought suit against Green Tree when they were unsatisfied with a home improvement program in which they enrolled.<sup>186</sup> The Harrises' suit included alleged violations under RICO, the Pennsylvania Unfair Trade Practices and Consumer Protection Law, breach of contract, unjust enrichment, misrepresentation and other claims.<sup>187</sup>

Green Tree moved to compel arbitration pursuant to an arbitration agreement the Harrises signed when they agreed to participate in a home improvement program.<sup>188</sup> Specifically, the arbitration clause appeared in a

179. *Id.* at 1151.

180. *See id.* at 1158-59 (stating that the clause was unenforceable because it did not specify an arbitration administrator or any rules governing any arbitration proceeding).

181. *See id.*

182. *Id.* (citing *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998)).

183. *See id.* at 1158-59.

184. *See id.* at 1159.

185. 183 F.3d 173 (3d Cir. 1999).

186. *See id.* at 176. Charles and Christine Harris were putative class members along with Willie and Nora Nelson. *See id.* at 176 n.2.

187. *See id.* at 177. The other claims were promissory estoppel, breach of fiduciary duty and tortious interference. *See id.*

188. *See id.*

secondary mortgage contract to finance improvement costs.<sup>189</sup>

The Harrises argued that the home improvement scheme was fraudulent.<sup>190</sup> They alleged that Green Tree recruited contractors to aggressively solicit business from unsophisticated senior citizens and others.<sup>191</sup> Once the contractors secured a contract, they would immediately assign the financing agreements to Green Tree.<sup>192</sup>

The arbitration agreement that the Harrises signed appeared in small print at the bottom of the back page of a standardized contract.<sup>193</sup> The Harrises alleged that they were required to sign the contract before the contractors would perform any work on their home.<sup>194</sup>

After the parties signed the contract, the contractors began work on the Harrises' home.<sup>195</sup> The Harrises alleged that "the contractors either did not perform the work specifically promised in the contracts, or performed the promised work, but in an unsatisfactory manner."<sup>196</sup> When the Harrises complained to Green Tree, they allegedly did not receive an adequate response.<sup>197</sup>

When Green Tree moved to compel arbitration, the Harrises filed a motion opposing arbitration based on theories of unconscionability and lack of mutuality.<sup>198</sup> The district court issued a Memorandum and Order denying Green Tree's motion based on these issues.<sup>199</sup>

On appeal, the Third Circuit first examined the issue of mutuality.<sup>200</sup> It stated that every party to a contract must provide consideration for the contract to be valid, but it need not be comprised of "reciprocal promises."<sup>201</sup> As long as both parties to an arbitration agreement provide consideration, the terms of an arbitration clause may be dissimilar as to

189. *See id.*

190. *See id.* at 176.

191. *See id.* The Harrises asserted that Green Tree solicited the contractors to obtain high-interest secondary mortgage contracts. *See id.* The Harrises alleged that Green Tree instructed the contractors to market themselves as Federal Housing Authority and Housing and Urban Development approved dealers of home improvement services. *See id.*

192. *See id.* at 176-77.

193. *See id.* at 177.

194. *See id.* at 176.

195. *See id.*

196. *Id.* at 177.

197. *See id.* The Harrises alleged that they did not receive what they had bargained for but were nevertheless "saddled with a sizeable debt." *Id.*

198. *See id.* at 178.

199. *See id.* The Harrises also contended that the clause was unenforceable, because they were fraudulently induced to enter into the secondary mortgage contract. *See id.*

200. *See id.* at 179-81.

201. *See id.* at 180 (citing RESTATMENT (SECOND) OF CONTRACTS § 79 (1981)).

the promises of each party.<sup>202</sup>

The agreement between Green Tree and the Harrises stipulated that the Harrises were bound to arbitrate all claims while Green Tree could litigate any claims it brought against the Harrises.<sup>203</sup> For this reason, the lower court had held that the arbitration agreement was unenforceable.<sup>204</sup> The Third Circuit disagreed, stating, "As long as the requirement of consideration is met, mutuality of obligation is present, even if one party is more obligated than the other."<sup>205</sup> The court held that the district court's decision was in error and stated, "It is of no legal consequence that the arbitration clause gives Green Tree the option to litigate arbitrable issues in court, while requiring the Harrises to invoke arbitration."<sup>206</sup>

The Third Circuit next considered unconscionability and conducted a two-part analysis: 1.) whether the agreement was procedurally unconscionable; and 2.) whether it was substantively unconscionable.<sup>207</sup>

Procedural unconscionability, the court explained, arises if the execution of the contract creates an atmosphere of "unfair surprise" for one party.<sup>208</sup> The Harrises argued that the contract was procedurally unconscionable, because the arbitration clause appeared in fine print and on the back page of the agreement.<sup>209</sup>

The Third Circuit found that the clause was not procedurally unconscionable and based its decision on case law and the FAA.<sup>210</sup>

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202. *See id.*

203. *See id.* at 177-78. The agreement stated:

Notwithstanding anything hereunto the contrary, we retain an option to use judicial or non-judicial relief to enforce a mortgage, deed of trust, or other security agreement relating to the real property secured in a transaction underlying this arbitration agreement, or to enforce the monetary obligation by the real property, or to foreclose on the real property agreement. Such judicial relief would take the form of a lawsuit. The institution and maintenance of an action for judicial relief in a court to foreclose upon any collateral . . . shall not constitute a waiver of the right of any party to compel arbitration.

*Id.*

204. *See id.* at 178.

205. *Id.* at 181 (citing *Greene v. Oliver Realty, Inc.*, 526 A.2d 1192, 1195 (Pa. Super. Ct. 1987)). "Modern contract law recognizes that, 'if the requirement of consideration is met, there is no additional requirement of . . . equivalence in the values exchanged.'" *Id.* (quoting *Greene*, 526 A.2d at 1195).

206. *Id.*

207. *See id.*

208. *See id.* Courts generally look to the process of execution and the form of the agreement, including size of print and ambiguous language. *See id.*

209. *See id.* at 182.

210. *See id.*

Specifically, it relied on the U.S. Supreme Court's decision in *Casarotto*, which analyzed a Montana statute requiring strict guidelines for the appearance of arbitration agreements.<sup>211</sup> The Court held that state statutes cannot impose any standards in arbitration clauses that are not imposed on other contracts pursuant to the FAA.<sup>212</sup> Applying the Court's decision, the Third Circuit held that the Green Tree clause was not procedurally unconscionable.<sup>213</sup>

The Third Circuit then focused on the issue of substantive unconscionability.<sup>214</sup> The court stated that a contract is substantively unconscionable if its terms are "grossly favorable to one side" and the other side does not assent to those terms.<sup>215</sup> The Harrises argued that the arbitration agreement was substantively unconscionable because of lack of mutuality, and the agreement did not require consent of the Harrises regarding Green Tree's choice of arbitrator.<sup>216</sup>

The appellate court disagreed with the Harrises' claims.<sup>217</sup> It stated that inequality of bargaining power on its own will not invalidate an agreement and re-iterated its holding on the mutuality issue.<sup>218</sup> It also found that the Harrises' claim that the arbitration clause is unenforceable because Green Tree is not required to obtain their consent in the process of arbitrator selection was unfounded.<sup>219</sup> The court determined that the contract expressly stated that the Harrises must consent to the choice of arbitrators.<sup>220</sup> Furthermore, if the parties could not decide, the FAA provides that either party may petition the court to appoint an arbitrator.<sup>221</sup>

In sum, the court held that the arbitration agreement between Green Tree and the Harrises was valid and enforceable and was not void for unconscionability or lack of mutuality.<sup>222</sup> It reversed the district court's decision and remanded the case with orders to grant Green Tree's motion

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211. See *id.* at 182-83; *supra* Part II.B.4 (outlining the decision in *Casarotto*).

212. See *Harris*, 183 F.3d at 182-83.

213. See *id.* at 183.

214. See *id.*

215. See *id.* at 181.

216. See *id.* at 183.

217. See *id.* at 184.

218. See *id.* at 183-84.

219. See *id.*

220. See *id.* at 177, 183. The arbitration agreement stated, "All disputes, claims, or controversies . . . shall be resolved by binding arbitration by one arbitrator selected by us with consent of you." *Id.* at 177.

221. See *id.* at 183; 9 U.S.C. § 5 (1994).

222. See *Harris*, 183 F.3d at 184.



to stay proceedings and compel arbitration.<sup>223</sup>

#### IV. HOW THE U.S. SUPREME COURT SHOULD DECIDE *RANDOLPH* AND *HARRIS*

As it stands now, the U.S. Supreme Court is reviewing *Randolph*. This review was likely, because the *Randolph* and *Harris* decisions occurred within two weeks of each other and the courts interpreted similar arbitration clauses differently. Also, because arbitration is such a fast-growing method of alternative dispute resolution, the Court likely will want to address these issues early as it did in *Allied-Bruce Terminix* and *Casarotto*.<sup>224</sup>

When the Court hears *Randolph*, the result likely will not be surprising. Using a solid foundation of substantive law and public policy, the Court likely will overturn *Randolph* and, if given the opportunity to hear it, affirm *Harris*.

##### A. *Substantive Law*

The Court need not look further than its own decisions to affirm *Harris*. The Court has strongly upheld pre-dispute arbitration agreements between consumers and businesses.<sup>225</sup> Even when these agreements appear in standardized form contracts, also referred to as “adhesion contracts,” the Court has upheld them.<sup>226</sup>

The Court in *Casarotto* specifically addressed one of the *Harris*’ main arguments. The *Harris*es argued that the contract was unconscionable because the arbitration clause appeared on the back page of an adhesion contract, and it was not typed in a font that brought attention to the clause.<sup>227</sup> In *Casarotto*, the Court held that statutes requiring arbitration clauses to meet higher standards than other contracts were void because they violated the FAA.<sup>228</sup> The arbitration

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223. See *id.*

224. See *supra* Part II.B.3-4 (outlining the *Allied-Bruce Terminix* and *Casarotto* decisions).

225. See *supra* Part II.B.3 (outlining the *Allied-Bruce Terminix* decision).

226. See *supra* Part II.B.3 (outlining the *Allied-Bruce Terminix* decision). Adhesion contracts are “[s]tandardized contract form[s] offered to consumers of goods and services on essentially ‘take it or leave it’ basis . . . .” BLACK’S LAW DICTIONARY 40 (6th ed. 1991). Although “these contracts are not the result of traditionally ‘bargained’ contracts . . . not every such contract is unconscionable.” *Id.*

227. See *supra* Part III.B (outlining the *Harris* decision).

228. See *supra* Part II.B.4 (outlining the *Casarotto* decision).

agreement in *Casarotto* appeared in regular type, just as it did in *Harris*.<sup>229</sup> Although a statute is not at issue in *Harris*, the Court would use the same analysis under the FAA to conclude that arbitration agreements need not meet stricter standards than other contracts.

The Eleventh Circuit's decision in *Randolph* that it had appellate jurisdiction over the district court's holding is a minority view that the Court likely will overturn. Only two other circuits have held that an order compelling arbitration is a "final decision" under the FFA.<sup>230</sup> Eight other circuits, however, have held that these decisions are not subject to appellate review.<sup>231</sup>

If the Eleventh Circuit followed the majority view, it would not have heard the appeal and thus would not have reached the issue of the arbitration agreement's enforceability. The Court likely will use this issue to determine that the Eleventh Circuit's decision was erroneous. Even if the Court agrees with the minority view and holds that the Eleventh Circuit did have jurisdiction, it likely will disagree with the contractual issues.

The Eleventh Circuit held that the arbitration clause in *Randolph* was unenforceable because the procedural elements of the arbitration process were not ascertainable.<sup>232</sup> The Third Circuit in *Harris* suggested a possible solution under the FAA's section 5.<sup>233</sup> Section 5 states that if no arbitrator

229. See *supra* Part III.B (outlining the *Harris* decision).

230. See *Armijo v. Prudential Ins. Co.*, 72 F.3d 793, 797 (10th Cir. 1995) (holding that an order compelling arbitration is final if the order disposes of all other issues in the case); *Arnold v. Arnold Corp.*, 920 F.2d 1269, 1276 (6th Cir. 1990) (holding that the district court's order compelling arbitration was final and thus subject to appeal).

231. See *Cook v. Erbey*, 207 F.3d 1104, 1107 (9th Cir. 2000) (dismissing an appeal of a district court's order compelling arbitration); *Seacoast Motors v. Chrysler Corp.*, 143 F.3d 626, 628-29 (1st Cir. 1998) (stating that the court lacked appellate jurisdiction over a district court's order compelling arbitration); *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 135-36 (3d Cir. 1998) (stating that orders arising from embedded proceedings are non-appealable); *In re Pisgah Contractors, Inc.*, 117 F.3d 133, 136 (4th Cir. 1997); *Napleton v. General Motors Corp.*, 138 F.3d 1209, 1212 (7th Cir. 1998) (stating that the court does not have jurisdiction over appeals where a district court compels arbitration); *Altman Nursing, Inc. v. Clay Capital Corp.*, 84 F.3d 769, 771-72 (5th Cir. 1996) (holding that an order compelling arbitration is an embedded proceeding and thus not subject to appellate review); *Filanto, S.P.A. v. Chilewich Int'l Corp.*, 984 F.2d 58, 60-61 (2d Cir. 1993) (holding that the court lacked appellate jurisdiction over the appeal of a lower court's decision to compel arbitration in an embedded proceeding); *Gammara v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95 (8th Cir. 1994) (dismissing an appeal for lack of appellate jurisdiction over an order compelling arbitration).

232. See *supra* Part III.A (outlining the *Randolph* decision).

233. See *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 183-84 (3d Cir. 1999)

or arbitration administrator is named in the arbitration agreement, either party may apply to the court, which must then "designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein . . . ." <sup>234</sup>

The Eleventh Circuit's decision in *Randolph* was erroneous because it found that the primary reason for denying Green Tree's motion to compel arbitration was the lack of specificity regarding arbitration procedures in the agreement. <sup>235</sup> Either party, if knowledgeable of the Court's view, could then have filed an application to the court pursuant to Section 5 of the FAA. <sup>236</sup> However, once the court issued its opinion, Green Tree's only option was to appeal.

The precise language of the FAA clearly favors Green Tree. In the future, however, Green Tree would benefit from the use of an established and impartial arbitration administrator, such as the National Arbitration Forum or the American Arbitration Association. The issue in *Randolph* would have been moot had Green Tree specified an arbitrator administrator and an appeal would have been unnecessary.

### B. Public Policy

In its several decisions interpreting the FAA, the U.S. Supreme Court has enunciated the strong public policy in favor of arbitration. This policy is likely to be a factor in the Court's decision when it decides *Randolph* and perhaps hears the *Harris* appeal. Public policy in favor of arbitration also stems from several other sources.

Some consumer-rights groups have adopted a supportive view of arbitration, including pre-dispute arbitration agreements. The Consumers Union of the United States, which publishes *Consumer Reports*, strongly advises consumers to insist on pre-dispute arbitration agreements in home-improvement contracts. <sup>237</sup> This advice even appears in a book

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(stating that the FAA section 5 provides for situations where an arbitration agreement does not include procedural guidelines, either expressly or by reference).

234. 9 U.S.C. § 5 (1994).

235. See *supra* Part III.A (outlining the *Randolph* decision).

236. See 9 U.S.C. § 5.

237. See CAROL HAAS, THE CONSUMER REPORTS LAW BOOK: YOUR GUIDE TO RESOLVING EVERYDAY LEGAL PROBLEMS 364 and inside cover (1994) (stating that the Consumers Union of the United States was established in 1936 "to provide consumers with information and advice on products, services, health and personal finance").

written for consumers as a self-help legal guide.<sup>238</sup>

Lewis Maltby of the American Civil Liberties Union (ACLU) also is a strong supporter of arbitration, primarily in the area of employment law. He lists its main asset as being more affordable than traditional litigation, thus providing more citizens with access to justice.<sup>239</sup> Arbitration allows many people who cannot afford the rising costs of litigation to settle disputes affordably.<sup>240</sup>

Also, the results of a recent study show that most Americans favor arbitration over litigation for settling disputes.<sup>241</sup> They believe that lawsuits are not worthwhile and prefer impartial legal experts to handle their disputes.<sup>242</sup>

Fifty-nine percent of Americans would choose arbitration over litigation, and when informed that the cost of arbitration could be seventy-five percent less than a lawsuit, the percentage of those favoring arbitration jumped to eighty-two.<sup>243</sup> Given these numbers, and the other strong support for arbitration, arbitration appears to be a win-win situation for all involved parties. The Court likely will not ignore these strong policy considerations when hearing an arbitration case, especially when it resolutely used them in its previous decisions. Moreover, major arbitration providers have taken steps to ensure that all parties receive fair and just hearings.

For example, the National Arbitration Forum has created an "Arbitration Bill of Rights" which guarantees such safeguards as reasonable time periods, affordable costs, impartial arbitrators, and an overall "fundamentally fair process."<sup>244</sup> Also, the National Arbitration Forum is the only arbitration administrator that requires its arbitrators follow substantive law when rendering their decisions.<sup>245</sup> With these pro-

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238. See *id.*

239. See Lewis L. Maltby, *Private Justice: Employment Arbitration & Civil Rights*, in *ARBITRATION NOW* 3 (1997). Lewis L. Maltby is the director of the American Civil Liberties Union's National Taskforce on Civil Liberties in the Workplace. See *id.* at 2. He states that an employee, to secure a plaintiff's attorney in a dispute with his or her employer, would need to have at least \$60,000 in "provable damages" which do not include intangible damages such as pain and suffering. See *id.* at 25.

240. See *id.*

241. See *Roper Poll*, *supra* note 17. The Institute for Advanced Dispute Resolution, in connection with the National Arbitration Forum conducted the Roper Starch survey. See *id.*

242. See *id.*

243. See *id.*

244. See National Arbitration Forum, *Bill of Rights with Commentary* (visited Jan. 9, 2000) <<http://www.arb-forum.com/other/index.html>>.

245. See National Arbitration Forum, *Code of Procedure Rule 20(A)* (visited Jan. 9, 2000) <<http://www.arb-forum.com/library/code.html>> ("Arbitrators have the

cedural safeguards, consumers and businesses alike can have their disputes settled in a forum that does not take as long and is less expensive than litigation while receiving the same or similar results they would have received in court.

All of these policy arguments strongly favor the present state of arbitration law in the United States. While the courts equally apply substantive law and public policy, it is easy to see why the common law manifests a preference for upholding pre-dispute arbitration agreements.

## V. CONCLUSION

The Court, in reviewing *Randolph*, likely will continue its long-standing position in favor of pre-dispute arbitration clauses. Since the mid-1980s, as the Court favored these contracts, policy arguments arose from several areas strengthening the already solid law of contractual arbitration. Therefore, the Court likely will overturn *Randolph* and, if it hears the case, consequently affirm *Harris*.

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powers provided by this Code, the agreement of the parties, and the applicable substantive law.") The American Arbitration Association's arbitrators may render decisions on what they believe is just and equitable. See American Arbitration Association, *Commercial Rules Rule R-45 (a)* (visited Mar. 4, 2000) <<http://www.adr.org>> ("The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.").